

OPINION
51-127

June 20, 1951 (OPINION)

PARENT AND CHILD

RE: Termination of Parental Rights, Adoption, Power of the Court

Your have asked the Attorney General for an opinion regarding some features of our statutes pertaining to termination of parental rights and adoptions.

One question is whether a district court in hearing a divorce case can issue a decree effectively terminating the parental rights of either party to the divorce action to the offspring involved.

Another question raised by your request is, if an unmarried mother goes before a county judge as required in section 14-1104 and signs a consent to adoption is she entitled to notice of the hearing on the petition for adoption?

In order to clarify some of these questions we call your attention to section 14-0522 from the chapter dealing with divorce. Said section reads as follows: "In an action for divorce, the court, before or after judgment, may give such direction for the custody, care, and education of the children of the marriage as may seem necessary or proper, and may vacate or modify the same at any time." It is generally presumed that a divorce decree may be amended by the court from time to time if changed conditions warrant the amendment.

We also call your attention to section 14-0715 of the 1949 Supplement, part of which reads as follows: "The fact, if it is a fact, that either parent may have secured a decree of divorce awarding the custody of such child, in no manner shall relieve either parent from the requirements and penalty of this section, except that compliance with the terms of such decree for support of such child shall be deemed a compliance herewith;" This section deals with abandonment or nonsupport of child. It appears from the wording just cited, even though the custody is awarded to one parent there is still a certain responsibility on the other parent and that under the law it is not contemplated that parental rights should be terminated in a divorce proceeding. It is our opinion that an order terminating parental rights in a divorce case is not in accordance with the intent of section 14-0715.

We now call your attention to a portion of section 14-1110 of the 1949 Supplement which reads as follows: "Notice must be given to any parent not consenting, whose parental rights have not been terminated, including a parent who has lost custody of the child through divorce proceedings,". Bear in mind that section 14-1110 pertains to notice.

We now call your attention to a portion of section 14-1104 of the 1949 Supplement which reads in part as follows: "but the consent of a parent who has abandoned the child, or who cannot be found, or

whose parental rights have been terminated by law shall be dispensed with and consent may be given by the director of the division of child welfare of the public welfare board,". We call your attention to the following quotation from section 14-1104, "The consent of a parent who has lost custody of a child through divorce proceedings, or of a father of an illegitimate child shall not be required." You will notice that section 14-1104 provides conditions under which the consent is not required. You will notice, however, that section 14-1110 provides that notice must be given even in cases where consent is not required.

In the light of the above quoted statutes, it is our opinion that where custody has been taken away from a parent in a divorce proceeding an adoption can be had without the consent of that parent, but such parent is entitled to notice of the hearing on the adoption.

We further hold that where an unmarried mother goes before a judge and signs a consent, that that is not a waiver of the notice of the hearing on the petition for the adoption of the child. We hold that under the statutes of the state of North Dakota the unmarried mother is entitled to her day in court and that she has not had such day in court unless there has been a hearing held under the statute for the specific purpose of terminating the parental rights, such hearing to be had upon notice as provided by law.

This office holds that a mother who has given her consent to the adoption of the child has a right to revoke such consent up to such time her parental rights are terminated at the hearing had for that specific purpose or until the court has entered a decree after proper notice, in a hearing on a petition for adoption.

We are fully aware that recent decisions in other states have held that where an unmarried mother goes before a county court and signs the consent to an adoption, that she cannot thereafter revoke such consent. We believe, however, under our statutes and under our constitution she has the right of revocation until there has been a termination in a court of competent jurisdiction. That is, she must have her day in court before she loses her parental rights to her child.

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Attorney General